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IN THE

Supreme Court of the United States

October Term 1995

RUTH O. SHAW, *et al.*,

Appellants,

v.

JAMES B. HUNT, JR., *et al.*,

Appellees.

JAMES ARTHUR POPE, *et al.*,

Appellants,

v.

JAMES B. HUNT, JR., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF OF THE CONGRESSIONAL BLACK CAUCUS AS AMICUS CURIAE IN SUPPORT OF APPELLEES

A. LEON HIGGINBOTHAM, JR.
(Counsel of Record)
GREGORY A. CLARICK
TERRI JAMES
DEBO P. ADEGBILE
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000

OF COUNSEL:

MARCELLA DAVID
308 Boyd Law Building
University of Iowa
Iowa City, IA 52246

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTERESTS OF AMICUS CURIAE

The Congressional Black Caucus (the "Caucus") is composed of 40 African Americans who have been elected to the United States House of Representatives and Senate. Thirty-six of the 40 members were elected from majority-minority districts. The determination regarding the constitutionality of North Carolina's redistricting legislation is one that will affect not only the two Caucus members from North Carolina, but also other Caucus members and millions of African Americans who reside in majority-minority districts.

ARGUMENT

I.

SUMMARY OF ARGUMENT

The Caucus believes that majority-minority districts are an indispensable means of advancing America from a political tradition of exclusion based on race, to a political future of full inclusion. The general purpose of all districting is to permit the representation of numerical minorities whose votes otherwise would be submerged by those of the majority. In the context of racial minorities, majority-minority districts operate to ensure that their votes are not consistently submerged.

Majority-minority districts also further the pluralist aspirations of our American democracy. These districts have enabled racial minorities, for the first time in some instances, to elect the candidates of their choice. This increased diversity within Congress legitimizes congressional discourse and legislation.

This Court's decisions in *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993) and *Miller* v. *Johnson*, 115 S. Ct. 2475 (1995), articulate the standard of review for race-conscious districting. Although redistricting decisions always have included consideration of racial demographics, this Court has decided that where race is the "predominant" factor motivating redistricting legislation that legislation should be evaluated under the most exacting standard of

constitutional review. *See Miller*, 115 S. Ct. at 2482-83; *Shaw*, 113 S. Ct. at 2824. This Court further notes that a redistricting plan is *not* narrowly tailored if it goes "beyond what is reasonably necessary" to further a compelling interest. *See Shaw*, 113 S. Ct. at 2831. The Caucus maintains that the North Carolina redistricting legislation was narrowly tailored to serve the state's compelling interest in remedying the effects of North Carolina's history of racial discrimination and political exclusion.[1/]

The State of North Carolina has a long, ugly history of racial discrimination and political exclusion. In the context of congressional elections, prior to the challenged 1992 redistricting legislation, African Americans in North Carolina had essentially been shut out of the political process for almost one hundred years. North Carolina used a variety of *de jure* methods—*e.g.*, literacy tests and poll taxes—to prevent African Americans from electing the candidates of their choice. In addition, *within the last ten years*, political parties and candidates in North Carolina have engaged in fraudulent schemes to intimidate African-American voters and have used race-baiting campaign tactics. As set forth below, North Carolina had a compelling governmental interest in enacting districting legislation that remedies the substantial effects of its past racist policies and present practices.

Moreover, race-conscious districting has not resulted in the harms this Court predicted. Representatives from majority-minority districts fairly and conscientiously represent the interests of their constituents—regardless of race. Further, the fact that the challenged districts were created, in part, to give political voice and electoral power to African-American communities of interest is not demeaning. Rather, the creation of these districts represents recognition of the bonds that often form among those with a common racial heritage and a shared experience of past and present racial discrimination.

[1/] The Caucus also joins appellees' argument that the lower court incorrectly found that race was the predominant factor in the drawing of the challenged districts.

II.

MAJORITY-MINORITY DISTRICTS ARE A CRITICAL TOOL FOR ACHIEVING A TRULY REPRESENTATIVE POLITICAL SYSTEM

The redistricting processes that took place across the country after the 1990 Census led to significant gains in the number of minority congressional representatives. As a result, Congress is more racially diverse today than ever in our Nation's history. Currently, there are 40 African Americans in Congress, 17 Hispanic Americans, 5 Asian Americans and 1 Native American.[2/] The current diversity in Congress is, in large part, due to the creation of majority-minority districts.

Prior to Reconstruction and the passage of the Fourteenth and Fifteenth Amendments to the Constitution, no African American served in Congress. From 1901 to 1928, there were no African Americans in Congress; from 1929 to 1944, there was but one.[3/] And, the voice of that lone Negro, Congressman Arthur Mitchell, was all but drowned out by the antagonistic posturing of his white colleagues.[4/] From 1945 to 1955 there were only two

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[2/] *See* David A. Bositis, African Americans and the 1994 Midterms: What Happened? (1994) [hereinafter Bositis, The 1994 Midterms].

[3/] For a list of African Americans who have served in Congress *see* Appendix A hereto.

[4/] During the 1936 Democratic convention, for example, Congressman Mitchell's own party rejected his participation in the electoral process: "Congressman Mitchell's presence on the podium . . . was used as an excuse for a U.S. Senator from South Carolina and eight other delegates to stage a walkout in protest." William L. Clay, *Just Permanent Interests: Black Americans in Congress: 1870-1991* at 72 (1992). In addition to slights inflicted by his political colleagues, Congressman Mitchell suffered indignities in a variety of contexts. For example, Congressman Mitchell was forced to ride in the coach car during a train ride to Arkansas, despite

(continued...)

African Americans. Regardless of the levels of charisma and capabilities possessed by these two representatives, their number prevented them from moving their colleagues to adopt and embrace an agenda of full inclusion. In 1957, when the number of African Americans in Congress doubled, to four, America was still far from a representative democracy.

Our country took a giant leap toward achieving its pluralist ideals, with enactment of the Voting Rights Act of 1965,[2] which paved the way for increasing numbers of African Americans to gain access to polling booths, state legislatures and the United States Congress. By the 1980's there were approximately twenty African Americans in Congress and a significant increase occurred after the elections of 1992, which brought the tally of Caucus members to 40.

North Carolina's First and Twelfth Districts and other majority-minority districts have moved America toward the ideal of a representative democracy, one that encourages the inclusion of all Americans in political discourse and decision making.

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[1](...continued)
his possession of a first-class ticket. Congressman Mitchell later testified that after the conductor was informed that Mitchell was a Congressman, the conductor replied "it didn't make a damn bit of difference who I was, that as long as I was a nigger I couldn't ride in that car." Congressman Mitchell considered pressing the issue further, but, as he testified, "I thought maybe I had better not; being the only negro in Congress . . . I had better not get lynched on that trip." A. L. Higginbotham, Jr. & W. C. Smith, *The Hughes Court and the Beginning of the End of the "Separate But Equal" Doctrine*, 76 Minn. L. Rev. 1099, 1103 (1992) (quoting *Mitchell* v. *U.S. Commerce Comm's.*, 313 U.S. 80 (1941)).

[2] 42 U.S.C. § 1973 *et. seq.* (1988).

A. Religious, Racial, and Ethnic Groups Form the Building Blocks of Our Pluralist Democracy

As this Court has noted, all districting involves classifying voters into groups, including groups defined by race or ethnicity.[1/] As Justice O'Connor has acknowledged, the reapportionment process has traditionally involved political accommodation of the "competing claims of political, religious, ethnic, racial, occupational and socioeconomic groups."[2/] Yet,

> [u]ntil now, no constitutional infirmity has been seen in districting Irish or Italian voters together, for example, so long as the delineation does not abandon familiar apportionment practices. If Chinese-Americans and Russian-Americans may seek and secure group recognition in the delineation of voting districts, then African-Americans should not be dissimilarly treated. Otherwise, in the name of equal protection, we would shut out "the very minority group whose history gave birth to the Equal Protection Clause."

Miller, 115 S. Ct. at 2506 (Ginsburg, J., dissenting) (quoting *Shaw*, 113 S. Ct. at 2845 (Stevens, J., dissenting)). In the context of America's unique history, it is essential that this Court recognize that African Americans, like other racial and ethnic groups, often form communities with distinct political interests.

In *Shaw*, and again in *Miller*, this Court warned that districting that recognizes shared interests among African Americans "may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in

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[1/] *See Shaw*, 113 S. Ct. 2816, 2826 (1993); *Miller*, 115 S. Ct. 2475, 2488 (1995).

[2/] *Davis* v. *Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring).

which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Miller*, 115 S. Ct. at 2486; *see Shaw*, 113 S. Ct. at 2832. As the history of racial violence and segregation detailed in Part III, *infra*, demonstrates, North Carolina has been "balkanized," *i.e.*, divided into hostile groups, for over one hundred years. The 1992 redistricting legislation did not create or even exacerbate these racial divisions.

Rather, North Carolina's 1992 redistricting legislation empowered and enfranchised those who long have been excluded from North Carolina's political life. A large proportion of white voters in North Carolina are resistant to voting for African-American candidates or for any candidate who supports initiatives perceived to be favorable to African Americans.[9] According to James M. O'Reilly, a political demographer involved in North Carolina politics for over 15 years, the possibility of an African-American candidate in North Carolina obtaining 30 or 40 percent of the white vote is remote in North Carolina, if not inconceivable.[9] As support for their argument against race-conscious districting, appellants point to the ability of African Americans *in other states* to be elected in majority-white congressional districts and to the widespread popularity of General Colin Powell—a man for whom not one vote has been cast by anyone—as examples of why majority-minority districts are unnecessary. (App. Brief at 30 n.26). These examples, however, ignore the persistent inability of African Americans to be elected from majority-white districts in North Carolina.[10] Far from

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[9] Expert Witness Statement of James M. O'Reilly, at 2.

[9] *Id.*

[10] These examples also ignore the racism of North Carolina voters who have rejected even white candidates who support racial inclusion. *Cf. Thornburg* v. *Gingles*, 478 U.S. 30, 74-77 (noting that proof that some minority candidates have been successful does not foreclose a § 2 Voting

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balkanizing North Carolina, the challenged districts have created a North Carolina delegation that is better suited to represent North Carolina's racially diverse population.[11/] The newly-integrated North Carolina delegation also has created a more pluralistic Congress.

B. The Importance of Pluralism in American Government

A pluralist democracy is the antidote to the hostility associated with "balkanization," "segregation," and "political apartheid." Pluralism enables individuals from different backgrounds to learn of the experiences, concerns, and opinions of others. The sharing of life experience—which is the first step toward understanding—is indisputably necessary if our American democracy is to thrive. Pluralism does not mean, however, that only a person of one race will be able to legislate a matter fairly when her or his race is involved. Instead, pluralism guards against the influences of individual prejudice and further creates a milieu in which the entire congressional system benefits from the multi-faceted experiences of its members. In the context of the judiciary, Professor Charles Warren characterized the limitations of homogeneity in this way:

> The Court is not an organism dissociated from the conditions and history of the times in which it exists. It does not formulate and deliver its opinions in a legal vacuum. Its Judges are not abstract and impersonal oracles, but are men whose views are necessarily, though by no conscious intent, affected by inheritance, education and

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[10/](...continued)
Rights Act claim).

[11/] Approximately 20 percent of the voting-age population in North Carolina is African American.

> environment and by the impact of history past and present.[12]

On a homogeneous court, no "outsider" challenges the biases the dominant group accepts as "self-evident" truths. As Justice Sandra Day O'Connor wrote of Justice Thurgood Marshall:

> At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.[13]

Justice O'Connor concluded that "outsiders'" stories "made clear what legal briefs often obscure: the impact of legal rules on human lives."[14]

Professor Warren's and Justice O'Connor's comments about the importance of pluralism apply equally to a legislature and its members. An unrepresentative legislature may articulate precepts or enact laws that seem appropriate to its members, who never imagine that their views may be nothing more than the "'prejudices' they 'share with [some of] their fellow-men.'"[15] The

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[12] 1 Charles Warren, *The Supreme Court in United States History* 2 (1926).

[13] Sandra D. O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217, 1217 (1992).

[14] *Id.*

[15] Oliver W. Holmes, *The Common Law* 1 (1881) ("[E]ven the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.").

American experience is replete with examples of such governmental biases.[16]

The benefits of a representative Congress are manifold. First, the decisions made by a representative Congress carry an air of legitimacy that is absent when decisions are made by a homogeneous body. The decision to commit forces to combat, for example, bears much less legitimacy when the legislative body acting in support of that decision does not well represent the soldiers sent to combat. During the 1991 Gulf War, Congress was faced with the decision whether to commit American forces—forces that are disproportionately black and poor—to combat. The congressional debate regarding the deployment of troops to Iraq was criticized as potentially illegitimate and unfair precisely because the composition of the Congress did not accurately reflect the composition of the community from which the soldiers sent into combat would come.[17]

Another example of the power of a pluralist legislature was recently demonstrated when the Senate Ethics Committee investigated Senator Packwood. The presence of women on the Ethics Committee and in the Senate forced the Senate to seriously address the misconduct of one of its own members. Such a searching inquiry would have been inconceivable even three years ago when there were only two women in the Senate.

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[16] *The Congressional Quarterly*, describing the passage of the 1965 Voting Rights Act, detailed twelve critical civil rights initiatives defeated in Congress—two anti-lynching statutes, five initiatives addressing poll taxes and literacy tests, three bills concerning fair employment practices, and two Civil Rights Acts. *See Cong. Q. Almanac* 551 (1965). Similarly, sexism influenced Congress and state legislatures, which in 1871 incorporated gender in the Fifteenth Amendment to ensure women did not gain suffrage. *See* Eleanor Flexner, *Century of Struggle*: The *Women's Rights Movement in the United States* 152 (rev. ed. 1975).

[17] *The Killing Fields Aren't Level*, N.Y. Times, Jan. 28, 1991, at A2.

In addition, a Congress comprised of representatives with varied backgrounds and experiences can bring their wealth of insight and perspective to bear on national issues that require innovative solutions. More often than not, congressional homogeneity and exclusivity are deterrents to rather than promoters of, innovation.

Finally, a pluralist Congress also ensures that issues of concern to African Americans and other racial minorities are consistently a part of the national agenda. For example, because of the influence of African-American voters in North Carolina's majority-minority districts, the representatives from these two districts can, in concert with other Caucus members, inform Congress of issues of special concern to all African-American North Carolinians.[11] As long as these districts remain majority-minority districts, it is likely that the interests of the numerous historically black colleges in North Carolina will be aggressively addressed; that redlining practices of banks affecting black neighborhoods will be closely scrutinized; and that cutbacks to social services will be challenged by representatives ready to dispute stereotypes of lazy black men and welfare mothers. Furthermore, unlike some of their predecessors who attempted to thwart the interests of African-American voters, these

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[11] In *Shaw* and *Miller*, the Court found the notion that individuals of the same race share political interests "demeaning." *Miller*, 115 S. Ct. 2475, 2486 (1995); *Shaw*, 113 S. Ct. 2816, 2827 (1993). And, indeed, it is true that the African-American community in North Carolina is diverse. For example, the interests of an African American who has been displaced due to the decline in agricultural jobs may differ from those of an African-American businesswoman who has been denied a loan by several banks. The North Carolina legislature, cognizant of that fact, created two majority-minority districts to reflect the different common interests of those in urban and rural settings. However, the fact remains that, with respect to some issues, an African-American farm worker and an African-American business person may have more in common with each other than with their white neighbors. Such an acknowledgment is not demeaning; it is realistic.

representatives can support civil rights initiatives without fear that taking a principled stand will end their political careers.

A Congress with members of all colors and both genders brings more American citizens into the political system, announces that government is for all Americans, increases the confidence of all American voters in the government and thereby cultivates political participation by all. Thus, the challenge in this and other voting rights cases is whether the significant racial pluralism finally occurring in the United States Congress will prevail—whether the voices and interests of minorities will be welcomed in the public debate—or will be silenced once more.

III.

THE HISTORY OF DISCRIMINATION IN NORTH CAROLINA JUSTIFIED THE CREATION OF TWO MAJORITY-MINORITY DISTRICTS

This Court held in *Miller* v. *Johnson*, that where race is the predominant factor motivating redistricting legislation such legislation is constitutional only if it is "narrowly tailored to further a compelling governmental interest."[19] The phrases "narrowly tailored," and "compelling governmental interest" are not self-defining. Accordingly, wise evaluation of majority-minority redistricting plans requires viewing them in proper historical perspective, applying the maxim of Justice Oliver Wendell Holmes: "a page of history is worth a volume of logic."[20] The political history in North Carolina is replete with examples of *de jure* discrimination and racial intimidation and violence. This history has created a current climate in which majority-minority districts are necessary to ensure that African-American voters are fairly represented.

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[19] *See Miller*, 115 S. Ct. 2475, 2482 (1993); *Shaw*, 113 S. Ct. 2816, 2818 (1995).

[20] *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921).

A. North Carolina Had A Compelling Interest in Engaging in Race-Conscious Districting to Remedy the Legacy of Racial Discrimination in the North Carolina Political System

The Fifteenth Amendment, ratified in 1870, declares that the right to vote "shall not be denied . . . by any State on account of race." Notwithstanding this direct constitutional command, North Carolina and other southern states have only recently abandoned—after being forced to do so by the Voting Rights Act and federal court enforcement of the same—policies and practices designed to exclude African Americans from full political participation. North Carolina's long legacy of racial exclusion began not long after ratification of the Fifteenth Amendment.

In 1898, white Democrats launched a "White Supremacy Campaign." Fannifold M. Simmons, North Carolina Democratic Party Chairman, issued the following warning to his fellow white North Carolinians, which captures the racial attitudes of this period:

> NEGRO CONGRESSMEN, NEGRO SOLICITORS, NEGRO REVENUE OFFICERS, NEGRO COLLECTORS OF CUSTOMS, NEGROES in charge of white institutions. NEGROES in charge of white schools, NEGROES holding inquests over the white dead . . . .[21]

He then declared:

> North Carolina is a WHITE MAN'S state, and WHITE MEN will rule it, and they will crush the party of Negro domination beneath a majority so

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[21] J.A. 611.

> overwhelming that no other party will ever again dare to attempt to establish negro rule here.[22]

White passions were so inflamed by this type of rhetoric that violence directed at African Americans and white Republicans was rampant. A particularly militant white group, the Red Shirts, armed themselves "with Winchester rifles and shotguns . . . . [and] stalked about, frightening Republicans, Fusionists, and blacks away from the polls."[23]

Legislators, newly-elected as a result of this campaign, enacted a program to enforce with laws the racial exclusion and segregation the campaign had accomplished by violence.[24] The enactment of legislation that would obliterate political participation by African Americans was primary on the agenda of these legislators. They submitted a constitutional amendment to the voters that conditioned the right to register and vote on a poll tax and a literacy test with a "grandfather clause" to protect the voting rights of illiterate white men.

North Carolina's governor from 1901 to 1903, Charles B. Aycock, set the tone for a lengthy period of African-American political exclusion ushered in by the White Supremacy Campaign. Governor Aycock proclaimed:

> I am proud of my State, moreover because there we have solved the Negro problem . . . . We have taken him out of politics and have thereby secured good government under any party and laid

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[22] *Id.*

[23] H. Leon Prather, Sr., *The Red Shirt Movement in North Carolina 1898-1900*, 62 J. Negro Hist. 174, 179 (1977).

[24] These legislators were, no doubt, emboldened by the 1896 Supreme Court decision of *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

> foundations for the future development of both races.
>
> I am inclined to give you our solution to this problem. It is first, as far as possible under the Fifteenth Amendment to disfranchise him; after that let him alone, quit writing about him; quit talking about him . . . let the Negro learn once and for all that there is unending separation of the races . . . that they cannot intermingle; let the white man determine that no man shall by act or thought or speech cross this line, and the race problem will be at an end.[25]

Other North Carolina leaders also expressed their commitment to policies of racial exclusion. North Carolina Governor Thomas Walter Bickett proclaimed in 1920:

> In North Carolina we have definitely decided that the happiness of both races requires that the white government shall be supreme and unchallenged in our borders.[26]

John Parker, upon accepting the 1920 Republican nomination for Governor of North Carolina, stated:

> The Negro as a clan does not desire to enter politics. The Republican party of North Carolina does not desire him to do so. We recognize the fact

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[25] Charles B. Aycock, Speech before the North Carolina Society, Baltimore (Dec. 18, 1903), in *The North Carolina Experience: An Interpretive and Documentary History* 415 (Lindley S. Butler & Alan D. Watson eds., 1984).

[26] Thomas W. Bickett, Message to the General Assembly of 1920, in *Public Letters and Papers of Thomas Walter Bickett, Governor of North Carolina 1917-1921* at 72 (R.B. House ed. 1923).

> that he has not yet reached the stage in his development when he can share the burdens and responsibilities of government.[27]

The racial hostility of North Carolina's leaders and citizens, literacy tests and poll taxes all worked together to eliminate African-American political participation in North Carolina. Having accomplished this goal, incidents of racial violence and explicit racial appeals subsided until 1948, when the national Democratic Party included a civil rights plank in its campaign platform. From this point forward, North Carolina has experienced a resurgence of appeals to racial prejudice. History has taught us that in America the perception that African Americans are gaining political power can often trigger fear, anger, or, at the very least, anxiety among some whites. This phenomena has motivated violence and direct and subtle racial campaign appeals.

In 1950, Willis Smith used racial appeals to defeat incumbent Frank Porter Graham in a Democratic primary campaign for nomination to the United States Senate. Graham had been a prominent supporter of New Deal policies and had given qualified support to the civil rights policies of the Truman Administration. In the runoff primary of 1950, supporters of Willis Smith distributed leaflets warning **"White People Wake Up! . . . Frank Graham Favors Mingling of the Races."**[28] In a racially-charged atmosphere, this accusation and others were sufficient to cost Graham the election.[29]

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[27] John Parker, An Address Upon Accepting the Republican Nomination for Governor (April 18, 1920), *quoted in* Richard L. Watson, *The Defeat of Judge Parker: A Study in Pressure Groups and Politics*, 50 Miss. Valley Hist. Rev. 213, 218 (1963).

[28] J.A. 614.

[29] Expert Witness Report Prepared by Professor Harry L. Watson, Race and Politics in North Carolina, 1865-1994 at 11-12 [hereinafter Watson Report].

After the *Brown* v. *Board of Education* decision in 1954, white fears of desegregation increased as did political appeals to racial prejudice. In 1955, for example, North Carolina Senator Sam Ervin drafted the "Southern Manifesto" pledging resistance to the desegregation process ordered by the United States Supreme Court *Brown* decision. Two of the three North Carolina representatives who refused to endorse the Southern Manifesto lost their bids for reelection after a vigorous campaign by segregationist groups.[20]

Moreover, North Carolina's history of discrimination in the electoral process is not confined to the Reconstruction and post-*Brown* eras. Even after passage of the Voting Rights Act, appeals to white racial fears have persisted in North Carolina elections. In 1966, two Democratic congressmen were defeated in a campaign in which Ku Klux Klan leaders handed out leaflets charging that the incumbents had bowed to federal pressures for desegregation.[21] George Wallace's 1968 presidential campaign appealed to voters' fears of court-ordered busing.[22] And, Jesse Helms, in his bid for Senate in 1972, received a public endorsement from the Grand Dragon of the North Carolina Ku Klux Klan.[23]

In the 1980's and 1990's, North Carolina's legacy of race-baiting campaigns has continued unabated. In 1983, an advertisement supporting Jesse Helms' bid for governor against Jim Hunt depicted Hunt sitting beside Jesse Jackson with accompanying quotations warning of the prospect of increased voter registration.[24] Commenting on this type of ad, one journalist remarked, "the primary motive is simply to make the association between Hunt and

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[20] J.A. 615.

[21] J.A. 617.

[22] *Charlotte News*, Oct. 29, 1968, at 5C.

[23] J.A. 618.

[24] *Id.*

blacks and to raise fears among whites that Hunt is a captive of black voters."[25]

Helms and the Republican party used a multitude of racially-oriented signals during Helms' 1990 bid for reelection to the Senate against an African-American candidate, Harvey Gantt. Representative J. Alex McMillan of the 9th District fanned racial fears with a 1990 fundraising letter that warned of "the potential danger of a sophisticated get-out-the-vote effort among the hard core Gantt constituency."[26] Gantt had been leading Helms in the polls until the final week of the race when the Helms campaign ran an advertisement showing a white man's hand crumpling a job rejection notice, with a voice-over explaining:

> You needed that job, and you were the best qualified. But they had to give it to a minority because of a racial quota. Is that really fair? Harvey Gantt says it is. Gantt supports Ted Kennedy's racial quota law that makes the color of your skin more important than your qualifications.[27]

This advertisement galvanized white support for Helms, bringing him victory.[28] During the same campaign season, an anonymous leaflet appeared in rural Columbus County, warning voters of "the

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[25] Watson Report, *supra* note 29, at 18 (citing *What North Carolina Newspapers Say About Voter Registration*, News of Orange County, June 8, 1983).

[26] J.A. 624.

[27] Kathleen H. Jamieson, *Dirty Politics* '80 at 97 (1992).

[28] *Id.* at 99-100.

Negro vote" and of the possibility that "more Negroes will vote in this election than ever before."[39]

In the 1992 presidential campaign, local Republican Party advertisements warned "[I]f Bill Clinton is elected President, Jesse Jackson will be a U.S. Senator."[40] Significantly, the modern pattern of using race to contaminate the electoral process has not been confined to inciting the racial fears of whites. Rather, the political environment in North Carolina is, in many ways, reminiscent of North Carolina's earlier history of intimidating African Americans away from polling booths. For example, the North Carolina Republican Party engaged in a massive "postcard campaign," mailing postcards to black voters to discourage them from voting by threatening prosecution of voters who gave false information to local Board of Elections officials. *See United States v. North Carolina Republican Party*, 91-161-Civ-5F (E.D.N.C. Feb. 27, 1992).

The continued vigor of racial discrimination in North Carolina is not surprising. Indeed, a mere decade ago federal courts found that North Carolina's *de jure* exclusion of African Americans from the voting process—with, among other means, a poll tax, a literacy test, and a prohibition against bullet voting[41]—had contributed to the continuing suppression of African-American

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[39] Watson Report, *supra* note 29, at 21.

[40] *Id.* (citing Fayetteville Observer-Times, Oct. 27, 1992, 6A).

[41] Bullet voting is a practice designed to maximize a group's voting strength in at-large voting schemes. In at-large districts—where multiple seats are filled in a single election—voters may cast one vote for as many candidates as there are seats available. Thus, if there are five seats available, each voter may cast a vote for five of the candidates running. In the case of bullet voting, instead of casting all of their votes, voters vote only for a "target" candidate, thereby avoiding the dilution of their vote that would result from voting for a full slate. Bullet voting provides gains to the "target" candidate relative to other candidates and therefore increases the likelihood of minority representation.

participation in North Carolina's political process.[42] In the *Gingles* opinion, the district court expressed hope that continued registration efforts would overcome the chilling effect of North Carolina's legacy of racial exclusion and political appeals to racial prejudice.[43] However, the lingering effects of historic discrimination in voting—as well as in other facets of civic life—persist.

The exclusion of African Americans from participating in North Carolina's political system has served to reinforce the legacy of racial segregation. For example, black North Carolinians endure poverty, inadequate education and medical care, infant mortality, unemployment and violent crime more acutely than their white counterparts.[44] A shared history of political exclusion and discrimination has created among North Carolinians a shared interest in effective political participation, including the ability to elect candidates of their choice.[45] North Carolina's 1991 redistricting legislation was not only a step toward recognizing that African-American North Carolinians disproportionately suffer from the above-mentioned harms, but also a step toward remedying them through the democratic process.

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[42] *See Gingles* v. *Edmisten*, 590 F. Supp. 345, 359-61 (E.D.N.C. 1984), *modified sub nom.*, *Thornburg* v. *Gingles* 478 U.S. 30 (1986).

[43] *Gingles*, 590 F. Supp. 345, 361.

[44] J.A. 194–99.

[45] *See Thornburg* v. *Gingles*, 478 U.S. 30, 64 (1986) (acknowledging racial groups frequently share socioeconomic characteristics such as income level, education, employment status, living conditions, language patterns and more).

B. Majority-Minority Districts Are Necessary Tools to Offset the Effects of Racially-Polarized Voting and Past Discrimination

The above-described legacy of *de jure* discrimination and race baiting campaign tactics has had a deleterious effect on African-American political participation. In addition, race-conscious districting in North Carolina, which began well before the 1992 legislation, also has contributed to the exclusion of African Americans from political discourse. North Carolina traditionally has considered race in making districting decisions. However, only in 1992 was the goal of North Carolina legislators to enhance minority representation, rather than to diminish it.

When first enfranchised, African-American men demonstrated an overwhelming preference for Republican candidates.[46] When Democrats attained a majority in the legislature in 1870, after a campaign of widespread violence and intimidation against African-American and white Republicans, they enacted redistricting legislation that "stacked" African Americans into one congressional district. This district came to be known as the "Black Second."[47] From 1872 until full disenfranchisement of African Americans in 1900, the Black Second contained twice the number of African Americans as their equal distribution would have dictated, thereby limiting African-American control to a maximum of one district out of nine or ten (depending on the total population in the decade).[48]

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[46] Watson Report, *supra* note 29, at 5.

[47] Expert Witness Report Prepared by J. Morgan Kousser, After 120 Years: Redistricting and Racial Discrimination in North Carolina, at 28 (citing Eric Anderson, *Race and Politics in North Carolina, 1872-1901: The Black Second* (1981)) [hereinafter Kousser Report].

[48] *Id.*

The Black Second offered several positive political benefits. African-American voter participation thrived during this period. Up to 85% of potential African-American voters participated in elections during the 1890's.[28] From 1872 to 1900, more than fifty African Americans were elected to the state legislature from areas included in the Black Second. During the same period, the Black Second sent three African Americans to Congress, including, in 1898, George White, the last African American to serve from the South for 72 years.[29]

As Congressman White exited Congress in 1901, North Carolina entered a long period marked by the complete exclusion of African Americans from political participation. When the Voting Rights Act prevented North Carolina from using laws designed to completely eliminate African Americans from the political landscape, North Carolina legislators began to engage instead in redistricting schemes designed to dilute black voting strength.

For example, North Carolina legislators sought a means of minimizing the political influence of the large, politically well-organized black community of Durham County. In 1965, when a redistricting plan would have joined Durham, Wake and Orange counties, conservatives in Wake County protested. Wake County Senator Jyles Coggins warned colleagues about a districting plan that might result in, "Negro block [sic] vot[ing]."[31]

During the 1981 redistricting process, Congressman L.H. Fountain—a conservative, white opponent of the civil rights movement representing a district with a large black population—waged a hard fought battle to minimize the number of

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[28] Kousser Report, *supra* note 47, at 29.

[29] *See* William R. Keech & Michael Sistrom, "North Carolina," in *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990* (C. Davidson & B. Grofman 1994) [hereinafter Quiet Revolution].

[31] J.A. at 621.

African Americans in his district. Congressman Fountain ultimately lost this battle after the United States Department of Justice denied the redistricting plan preclearance.[32] As a result, the African-American population in Congressman Fountain's district ultimately grew to 40 percent of the total voting-age population.[33]

Yet, even with a 40 percent African-American population, substantial barriers to black electoral success remained. An African-American candidate, H.M. "Mickey" Michaux ran for Congress in Congressman Fountain's former district against a white Democrat, Tim Valentine.[34] Although Michaux led in the first primary, he ultimately lost after Valentine ran ads invoking white fears of black political power. His ads warned voters that Michaux would benefit from "the same well organized block [sic] vote" and that "my opponent will again be bussing his supporters to the polling place in record numbers."[35] Valentine was ultimately victorious, despite the fact that Michaux received over 90 percent of the black vote.[36] Valentine's use of appeals to racial fears intensified racially polarized voting, resulting in defeat for the candidate preferred by the vast majority of the African-American population in that district.

As previously noted, the goal of *all* districting is to ensure that the votes of numerical minorities are not consistently submerged by those of the majority. Michaux's defeat illustrates that majority-minority districts, including those challenged in this case, are necessary to ensure that racial minorities have the ability to elect candidates of their choice. Thus, the lingering effects of

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[32] J.A. 622-23.

[33] J.A. 623.

[34] *Id.*

[35] *Id.*

[36] *See* Declaration of State Representative Henry M. Michaux.

North Carolina's history—in racist political exclusion, in racial appeals in political campaigns, in redistricting practices—provided a compelling state interest for the creation of the districts challenged in this litigation. *See Shaw* v. *Hunt*, 861 F. Supp. 408, 464-65, 476 (E.D.N.C. 1994).

IV.

REPRESENTATIVES FROM THE CHALLENGED DISTRICTS ASSIDUOUSLY REPRESENT THE INTERESTS OF ALL THEIR CONSTITUENTS

In *Shaw*, this Court stated its fear that representatives from majority-minority districts may "believe that their primary obligation is to represent only members of that group, rather than their constituency as a whole." *Shaw*, 113 S. Ct. at 2827. Because appellants—did not and could not—submit proof that Representatives Clayton and Watt have failed to represent their interests, the Court should presume that Representatives Clayton and Watt have fully represented appellants and the rest of their constituents. *See Davis* v. *Bandemer*, 478 U.S. 109, 132 (1986). However, even without the benefit of such a presumption, the evidence presented below demonstrated that Representatives Clayton and Watt well represent their constituents of all races.

As a practical matter, the racial makeup of the challenged districts renders it improbable that Representatives Clayton or Watt would ignore their white constituents. Both of the challenged districts have voting-age populations that are approximately 53 percent black, 45 percent white and 3 percent other races. Accordingly, Representatives Clayton and Watt must court the votes of their constituents without regard to race, if they seek to be reelected.[22]

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[22] *Cf. Gingles* v. *Edmisten*, 540 F. Supp. 345, 358 n.21 (1984) (sixty percent black population generally considered necessary to ensure effective voting majority), *modified sub nom.*, *Thornburg* v. *Gingles*, 478 U.S. 30 (continued...)

In addition, those appellants who belong to the Democratic Party certainly have suffered no "representational injury." Representatives Clayton and Watt have voting records, which are essentially indistinguishable from their white Democratic Party partisans.[28] Nor can Republican constituents in these districts claim representational injury, "because one's constitutional rights are not violated merely because the candidate one supports loses the election." *Shaw*, 113 S. Ct. at 2846 (1993) (Souter, J., dissenting) (citing *Whitcomb* v. *Chavis*, 403 U.S. 124, 153-55 (1971)).

In fact, Representatives Clayton and Watt endeavor—as do all Caucus members—to effectively represent all of their constituents.[29] Their ability to ably represent their constituents is enhanced by the communities of shared interests within both districts. For example, many constituents in Congresswoman Clayton's district either currently reside in agricultural settings or are displaced agricultural workers. Accordingly, Clayton has become a member of the House Committees on Agriculture and Small Business. Constituents in Congressman Watt's district, by contrast, reside primarily in urban settings, and the district is characterized by the presence of many financial institutions, and historically black colleges. In order to further the wide range of interests among his constituents, Congressman Watt sits on the House Committee on Banking, Finance and Urban Affairs.

In addition, Representatives Clayton and Watt serve the shared interests of African Americans in their respective districts

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[27](...continued)
(1986).

[28] *See* 52 Cong. Quarterly Weekly Report 3656-67 (1994).

[29] By contrast, for centuries many white legislators at all levels of government have acted against the interests of their African-American constituents. For example, as noted in Part III, Congressman Fountain represented a district with a population that was 40 percent African American, yet he opposed the Civil Rights movement and its legislative enactments.

and in North Carolina as a whole. Judicial recognition of the frequency with which African Americans form communities with distinct political interests is neither "demeaning" nor evidence of unfair "stereotyping." Rather, as Justice Ginsburg noted in *Miller*:

> [E]thnicity itself can tie people together, as volumes of social science literature have documented—even people with divergent economic interests. For this reason, ethnicity is a significant force in political life.
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> . . . .
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> To accommodate the reality of ethnic bonds, legislatures have long drawn voting districts along ethnic lines. Our Nation's cities are full of districts identified by their ethnic character--Chinese, Irish, Italian, Jewish, Polish, Russian, for example . . . . The creation of ethnic districts reflecting felt identity is not ordinarily viewed as offensive or demeaning to those included in the delineation.[40]

The Caucus maintains that there are African American communities of interest in the challenged districts. However, we also note, along with Justices Stevens and Souter, that if there are no common interests to be found among African Americans in North Carolina, there is *ipso facto*, no "representational injury" suffered by appellants by virtue of their placement in a majority-minority district and representation by an African-American congressperson.[41]

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[40] *Miller*, 115 S. Ct. 2475, 2504-5 (1995) (Ginsburg, J., dissenting).

[41] *Id.*, at 2497-99 (1995) (Stevens, J., dissenting) (noting appellants' standing depends on assumption all black voters will support same candidate and successful candidate will ignore interests of white constituents); *see also Shaw*, 113 S. Ct. 2816, 2845-46 (Souter, J., (continued...)

Finally, Representatives Clayton's and Watt's abilities to serve the interests of their African-American constituents in no way diminishes their abilities to well represent their constituents of other races. Both representatives have undertaken to make themselves accessible to their constituents and to keep their constituents well informed about events in Congress. Congresswoman Clayton, for example, has installed a toll-free phone line to enhance the ability of her largely, low-income rural constituents to communicate with her.[92] In addition, she visits all counties within her district during weekends and congressional recesses, and employs field representatives and case workers who maintain regular, publicized office hours. At the time of trial, she had held more than ten community forums on issues including health care, education, economic development and crime. She regularly informs her constituents of important events in Congress with a community newsletter. According to Congresswoman Clayton, her white constituents communicate their opinions and concerns to her regularly.[93]

Similarly, Congressman Watt reaches out to all his constituents. Upon taking office, Watt mailed every resident in his district a Guide to Constituent Services, containing the addresses and phone numbers of his offices and information regarding federal agencies, passports, government documents and more.[94] Congressman Watt is so adamant about maintaining direct contact with his constituents that he has instituted a policy that his phone

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[91](...continued)
dissenting) (acknowledging commonality of interest among racial minorities and absence of harm to white voters from mere placement in majority-minority districts).

[92] Witness Statement of Congresswoman Eva M. Clayton at 5.

[93] *Id.*

[94] Witness Statement of Congressman Melvin L. Watt ¶ 16(b) and Exhibit B attached thereto.

calls not be screened.[22] In addition to Congressman Watt's offices in Durham, Greensboro and Charlotte, Congressman Watt employs a mobile caseworker who maintains office hours in municipal facilities throughout each area of the district. The Congressman regularly mails information to mayors and city managers in his district regarding the impact of federal legislation. His mailings have addressed empowerment zones, the earned income tax credit and community banking legislation. Finally, like Congresswoman Clayton, Congressman Watt has conducted several town meetings, where black and white constituents alike express their concerns and opinions.[23]

The evidence below clearly demonstrated that Representatives Clayton and Watt have served all their constituents effectively, and appellants have not suffered any "representational harm" due to their residence in a majority-minority district.

V.

SHAW AND *MILLER* WERE WRONGLY DECIDED

In the event this Court finds itself obligated by the standards set forth in *Shaw* and *Miller* to hold that the challenged districts violate the Equal Protection Clause, we submit that the Court should take this opportunity to repudiate the holdings of those two cases pursuant to the rationale articulated in *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995).

In *Adarand*, the Court abandoned principles laid out in a case decided only five years earlier. In departing from such recent precedent, Justice O'Connor, writing for the majority, acknowledged that

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[22] *Id.* at ¶ 16(c).

[23] *Id.* at ¶ 16(f).

> [r]emaining true to an "intrinsically sounder" doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with decisions that came before it; the latter course would simply compound the recent error and would likely make the unjustified break from previously established doctrine complete. In such a situation, "special justification" exists to depart from the recently decided case.

Id., 115 S. Ct. at 2115. This Court should be no less reluctant to depart from the holdings of *Shaw* and its progeny, because, like *Plessy v. Ferguson*, *Shaw* was wrong the day it was decided.[47]

Conclusion

Although all parties long for the day when one's race has little or no effect on the quality of one's life, appellees and the Caucus realize that because that day has not arrived, majority-minority districts are necessary. Americans of all races see the world through prisms colored by their individual and collective pasts. For this reason, a district that to some resembles a "bug splattered on a windshield,"[48] may to others look more like a winding path leading to political inclusion. Racism persists in America; African Americans routinely suffer racism in their daily

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[47] In *Fullilove v. Klutznick*, 448 U.S. 448, 522 (1980), Justice Rehnquist joined Justice Stewart's view that "*Plessy v. Ferguson* was wrong when decided." This view has been endorsed by two members of the *Shaw* majority. *See Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2813 (1993) ("[W]e think *Plessy* was wrong the day it was decided.") For an argument that *Shaw* was wrongly decided, *see* A. Leon Higginbotham, Jr., G. Clarick, & M. David, *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 Fordham L. Rev. 1593 (1994).

[48] *Shaw*, 113 S. Ct. 2816, 2820 (quoting *Wall St. J.*, Feb. 4, 1992, at A14).

lives. The reality of life in the United States prevents African Americans from enjoying the luxury of pretending America is color blind. As this Court makes a decision fundamental to the future of our representative democracy, it must accept what most African Americans and many Americans of all races know to be true: race still matters.[22] In America today, voting is racially polarized and the color of a candidate's skin affects voter attitudes. In this light, the necessity of majority-minority districting to render our democracy representative is compelling.

The lower court in *Shaw* v. *Hunt* correctly decided that North Carolina's legacy of racial discrimination and political exclusion called out for a remedy. As a direct result of North Carolina's racist policies, from 1901 to 1993 no African American from North Carolina served in the United States Congress.[23] North Carolina's 1992 redistricting legislation represents a good faith effort to remedy its tragic history of racial exclusion. Now, for the first time in its history, North Carolina has an integrated congressional delegation that reflects the State's racial diversity.

This Court should uphold the judgment of the district court below to the extent it found North Carolina's redistricting legislation to be a narrowly tailored means of serving a compelling state interest in redressing North Carolina's long history of racial discrimination and political exclusion. A decision upholding the constitutionality of the majority-minority districts in North Carolina

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[22] *See* Cornel West, *Race Matters* 3 (1993):

> To engage in a serious discussion of race in America, we must begin not with the problems of black people but with the flaws of American society-flaws rooted in historic inequalities and longstanding cultural stereotypes. How we set up the terms for discussing racial issues shapes our perception and response to these issues.

[23] *See* Appendix A.

would be in accord with the evidence presented below, based on the standards articulated in *Shaw* and *Miller*, and a rendering of justice.

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Respectfully submitted,

A. Leon Higginbotham, Jr.
Counsel of Record

Gregory A. Clarick
Terri James
Debo P. Adegbile
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

Counsel for the Congressional Black Caucus

OF COUNSEL:

Marcella David
488 Boyd Law Building
Byington & Grand
Iowa City, IA 52245